APPEAL No. 17-10328-K

UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

WARREN MUMPOWER

v.

UNITED STATES OF AMERICA

MEMORANDUM IN SUPPORT OF MOTION

FOR CERTIFICATE OF APPEALABILITY

Warren Mumpower, pro se

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P.O. Box 24550

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U.S. COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

CERTIFICATE OF INERESTED PERSONS

Warren Mumpower v. United States Appeal No. 17-10328-K

Berger, Michael, Co-defendant

Collier, Lacey A., Senior U.S. District Judge, N.D. Fla.

Cordero, Barbara, Special Agent, FBI

Couch, Clinton A., Attorney (CJA) N.D. Fla.

Davies, Robert G., AUSA, N.D. Fla.

Fay, Circuit Judge, 11th Cir.

Freeman, James, Co-defendant

Freitas, Lisamarie, Attorney (DOJ)

Godfrey, Robert, Federal Defender, M.D. Fla.

Goldberg, David L., AUSA, N.D. Fla.

Lang, E. Brian, Trial Attorney, (CJA) N.D. Fla.

Printy, Gary L., Appellate Attorney, (CJA) N.D. Fla.

Smith, Cory J., AUSA, N.D. Fla.

Sprowls, Paul A., AUSA, N.D. Fla.

Stinson, Robert D., Attorney (Retained) N.D. Fla.

Timothy, Elizabeth M., Magistrate Judge, N.D. Fla.

Vinson, Roger, Senior District Judge, N.D. Fla.

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UNITED STATES COURT OF APPEALS

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MEMORANDUM IN SUPPORT OF MOTION

FOR CERTIFICATE OF APPEALABILITY

Defendant Warren Mumpower, pro se, hereby appeals to the Eleventh Circuit Court of Appeals the District Court's denial of his § 2255 Motion To Vacate, Set Aside or Correct A Sentence and their denial of a Certificate of Appealability (COA) on this matter. Mumpower requests that the Eleventh Circuit Court of Appeals issue a COA on the issues discussed infra or in the alternative vacate the District Court's decision and remand to the court below for discovery and an evidentiary hearing.

This defendant asks this court to accept these pleadings as presented. "A pro se complaint, 'however inartfully pleaded,' must be held to 'less stringent standards than formal pleadings drafted by lawyers.'" Estelle v Gamble, 429 US 97, 106; 97 S.Ct. 285 (1976), quoting Haines v Kerner, 404 US 579, 92 S.Ct. 592 (1972). Pro se "[f]ederal pleadings are construed liberally according to...substance rather

than...form or label." United States v Dickson, 403 Fed Appx 931 (5th Cir. 2010). See also Tannenbaum v United States, 148 F3d 1262, 1263 (11th Cir. 1998).

BACKGROUND

Defendant Mumpower was arrested in Spokane, Wa., on February 29, 2008, on various child pornography charges and was extradited to Pensacola Fl., and convicted in a trial by jury in the Northern District of Florida, Pensacola Division on January 14, 2009. Mumpower appealed the convictions and sentence to the Eleventh Circuit. A decision was handed down on February 6, 2012. Two counts (Counts 2 and 40) were vacated. Certiorari was denied by the Supreme Court on October 29, 2012. Mumpower filed a 28 USC § 2255 Motion To Vacate, Set Aside Or Correct A sentence (Doc 1040). The government filed its response on February 14, 2014 (Doc 1085). Mumpower filed a reply (ECF 1116). On October 10, 2016, the Magistrate issued a Report And Recommendation (Doc 1208) denying the motion and issuance of a COA. No evidentiary hearing was held although one was requested both in Mumpower's memorandum (page 68) and his reply (page 53). Various facts remain in dispute. Mumpower filed his objections to the R&R (Doc 1212). At that time he requested a COA on several issues. Some of those issues are repeated here. After review, the District Judge issued a final order on November 16, 2016 (Doc 1214) denying the motion and the issuance of a COA.

ISSUES BEFORE THE COURT

1.) Is the Indictment faulty for failing to state with particularity the offense conduct of Counts 12, 22, and 35, violating defendant's due process rights, and

A. Is trial counsel, E. Brian Lang, constitutionally ineffective for failure to address the faulty indictment either in a pre-trial motion to dismiss the indictment for failure to state a claim or in the alternative file a motion to dismiss after the government rested their case, and/or

B. Is appellate counsel, Gary l, Printy, constitutionally ineffective for failure to argue the faulty indictment on appeal?

2.) Is the evidence insufficient to support a conviction for Counts 1, 12, 22, and 35, violating due process, confrontation clause, free speech rights, and actual innocence under the Constitution, and

A. Is trial counsel constitutionally ineffective for failure to build an adequate record of the evidence by not presenting a defense, and/or

B. Is appellate counsel constitutionally ineffective for failure to argue the insufficiency of the evidence on appeal?

3.) Did the Appellate Court violate defendant's constitutional due process rights when it constructively

amended the indictment by adding conspiracy as a third predicate act to Count 1, and changing the government's theory of prosecution in order to sustain a conviction on Count 1, and was appellate counsel constitutionally ineffective for failure to address these errors on a motion for rehearing or rehearing en banc?

4.) Did the District Court err when it failed to properly address each of this defendant's Constitutional claims, and did the Court err when it denied Mumpower the opportunity to further build the record by holding an evidentiary hearing?

DISCUSSION

1.) Faulty Indictment

The Superseding Indictment for Mumpower is lacking under the Sixth Amendment to the Constitution as it fails to state with particularity the offense conduct for Counts 12, 22, and 35 (and by reference, Count 1). Russell v. United States, 369 US 749, 765 (1962). A faulty indictment creates issues as to whether or not the jury was unanimous as to which crime they convicted the defendant of, and thus leaves this defendant susceptible to double jeopardy, a violation of the Fifth Amendment to the Constitution. A proper indictment should include sufficient details such as including the date of the alleged substantive count AND the name of the file allegedly shared to protect from double jeopardy.

The Court below was factually and legally wrong in their R&R (Doc 1208, pgs 9-10) and failed to respond as to why Russell does not apply. Mumpower does not disagree with the District Court's denial of a Bill of Particulars nor is this defendant relitigating a settled issue. Trial counsel erred when asking for a Bill of Particulars. "[I]t is a settled rule that a Bill of Particulars CANNOT save an invalid indictment." Russell, Id. at 770 (emphasis added). Thus a reasonably competent attorney would have filed a motion to dismiss the indictment for failure to state a claim based on the particularity required by the Supreme Court's ruling in Russell which is founded upon the Fifth and Sixth Amendments to the Constitution. By their denial of a Bill of Particulars, the District Court acknowledged the trial attorney's constitutional ineffectiveness under the Sixth Amendment in pursuing the incorrect path to correct a major constitutional error. There would be less confusion as to what exactly this defendant was charged with. Mumpower would have been better prepared at trial and on appeal.

Appellate counsel is also constitutionally ineffective under the Sixth Amendment for his egregious criminal and unethical conduct when he plagiarized co-counsel's brief when he could have adopted those few issues that had a good chance of success and write his own brief on the issues Mumpower requested. His conduct was deliberate, malicious and denied Mumpower his due process and a fair hearing at the appellate level.

2.) INSUFFICIENCY OF THE EVIDENCE.

Mumpower disagrees with the Magistrate's R&R as the report is factually and legally incorrect as to the insufficiency of the evidence and fails to address all the constitutional claims. Mumpower discussed in his memorandum in great detail, the insufficiency of the evidence. Of the four advertisements and transportations presented (WM-1, WM-5, WM-11A and WM-12), WM-1 (Doc. 723, p. 842, a post by Waffles - images not published) was not intended to be for a conviction as admitted to by the government in its response and so noted by the Magistrate, infra. See Government's Appellate brief, pg. 18.

A. Advertisement and Transportation

WM-11A is a set of pictures called Rom(c). (Memorandum pg. 32). Simply stated, the only necessary error that needs to be mentioned, and it is constitutionally fatal due process, is the government did not publish the images for this post to the jury for them to determine whether they are child pornography or legally protected free speech. Mumpower believes they are legal. The text post for WM-11A is a Doc. 723, pg. 860, but nowhere can one find within Doc. 723 where the images are published to the jury (See Doc. 723 pgs. 839-930). Failure to prove all the elements (By not publishing the images) violates Mumpower's due process rights under the Fifth Amendment as well as his Sixth Amendment confrontation rights. "[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of EVERY FACT necessary to constitute the crime with which he is charged." In re Winship,

397 US 358, 364 (1970)(emphasis added).

As the set is legal, this defendant's free speech right under the First Amendment is also violated. "Child pornography is not created when the pedophile derives sexual enjoyment from an otherwise innocent photo. As the Ninth Circuit stated, 'Private fantasies are not within the statute's ambit.' [United States v. Wiegand,] 812 F2d [1239,] 1245. When a picture does not constitute child pornography, even though it displays nudity, it does not become child pornography because it is placed in the hands of a pedophile, or in a forum where pedophiles might enjoy it. Faloona v. Hustler Magazine, Inc., 607 F. Supp. 1341[, at FN 4](N.D.Tex. 1985)(nude pictures of children did not constitute child pornography when published in "legitimate" Sex Atlas or in "raunchy" Hustler magazine, because they did not depict children engaged in sexual conduct). [United States v.] Villard, 885 F2d [117,] at 125 [(3rd Cir. 1999)]." United States v. Larkin, 629 F3d 177, 184 (3rd Cir 2010). "We must ... look at the photograph, rather than the viewer. If we were to conclude that the photographs were lascivious merely because [the user] found them sexually arousing, we would be engaging in conclusory bootstrapping rather than the task at hand - a legal analysis of the sufficiency of the evidence of lasciviousness." Villard, Id. The jury cannot determine if the images are child pornography if they have not seen the pictures. Thus we have a fatal constitutional violation.

WM-12 (Doc 723, pgs. 866-868) is an actual innocence claim. The post is discussed in detail within Mumpower's memorandum (pgs. 22-28)(Discussion of Special Agent Cordero's

perjury continues to pg. 31). See also Mumpower's Reply brief pgs. 31-32. The government failed to provide any administrative subpoenas for the Usenetguide account or whose computer the text post appears to come from, violating Mumpower's right to confront the evidence which violates Mumpower's due process and confrontation rights. The government relies only on the nic (Garfield) which is USER DEFINED and can be changed at will (Doc. 723, pg. 875, L 19). Mumpower provided Joint Exhibit WM-1, a confession by Box of Rocks stating that it was he (aka Cartman), not the real Garfield that made the post. Joint Exhibit WM-1 is evidence that the government provided to the defendant, not something he dug up elsewhere or concocted himself.

Trial counsel screwed up royally with his cross-examination, destroying any credibility this defendant could have gained with the jury as to his innocence (Doc. 723, pg. 876. See also the government's closeing argument (Doc. 760, pg 96, L9-24). This isn't a smoke screen. It's a demonstration of Lang's failure to prepare for trial. He failed to make use of his expert witness and therefore had not a clue what he was doing. Thank you government for proving my point, Lang is constitutionally incompetent. This is a comple-te breakdown of the adversarial process during the trial phase. United States v. Chronic, 466 US 648, 657-658. The whole line of argument presented in Mumpower's Memorandum should have been presented by this defendant's trial counsel on defense but he chose instead to abandon his client turning his representation into a sham. Thus he is constitutionally ineffective under the Sixth Amendment. See Chronic, Id. at

654.

The last advertisement/transportation is WM-5. It has its own issues. See Defendant's Memorandum, pgs. 33-35. Several important issues are raised here.

First, there was an administrative subpoena shown to the jury for Giganews but none for Mumpower's Internet Service Provider (ISP). Unless both administrative subpoenas are provided, it is only speculation as to who actually made the post. On cross-examination Federal Defender Thomas Keith, representing James Freeman in this matter, asked Special Agent Wilder of the Innocent Images Task Force, "And unless you actually trace the particular header, if you can, you don't know for sure who is sending that message, right?" Wilder replied, "That's correct." Keith continues, "I mean, that's the way to actually verify whose account was being used, things of that nature?" And Wilder replies, "Yes, Sir." (Doc 721, pg. 295, L 9-14).

The second problem with WM-5 is the fact that the government stated that they found keys missing (Doc 723, pg 929, L 13-16). Importantly, the government did not find the necessary key to post WM-5, (the "E" keys - binary or chat). The last key for the Achilles group possessed by Mumpower, according to government evidence was no longer used after January 21, 2007 - three days before the post was made using the new "E" key (Memorandum, pg. 34). The government did not find the "7" keys (chat or binary), the active keys at the time of Mumpower's arrest (Doc 720, pg. 96, L 1-5)(See also defendant's Reply Brief Exhibit RX-1, pgs. 6-7), nor did they find any keys used by the group between the "E" keys and the

"7" keys.

Throughout the trial the government stressed the importance of the keys, summing up their theory of prosecution thus, "And when you got in, you were given the keys to the kingdom...These were invaluable." (Doc 760, pg. 5, L 24-25). "In fact, they were the keys to the Kingdom. WITHOUT THEM, YOU COULD NOT ACCESS THE TREASURE, the text posts, the vile posts with the ever-essential instructions. Without those instructions, there was no way to access the images of child pornography." (Doc 760, pg. 6, L 8-12). Without the keys, it would be impossible to encrypt the messages and post them to the group.

The third issue with WM-5 involves Trojans found on Mumpower's computer which would allow someone to take over his computer unknown to Mumpower (Memorandum pgs. 34-35)(Doc 723, pg. 916, L 19 to 917, L 11). The discussion there is clear. We have a post where someone used Mumpower's Giganews account to post WM-5 but don't know if it went through this defendant's ISP or not (ie., from Mumpower's computer). We know the government did not find the "E" keys, the keys necessary to post WM-5. Without the keys and the administrative subpoenas for Mumpower's ISP, as well as the testified Trojans found, to conclude the post was by Mumpower is mere speculation based on constitutionally insufficient evidence. See in re Winship, at 364 (supra). Identity theft did occur by the same person that posted WM-12, stealing Berger's Newscene account password and using his account to post which resulted in Berger being erroneously arrested and accused of being Box of Rocks. This brings us to the basic

fact that the government did not meet its constitutional obligation to prove beyond a reasonable doubt that Mumpower posted WM-5.

WM-11A and WM-12 were not considered by the Grand Jury as advertisements or transportation. WM-11A was presented as an overt act in furthering of the conspiracy, though there was no finding of guilt by the jury on the Rom(c) set, WM-11A.

With trial counsel's refusal to defend Mumpower, the evidence showing that Box of Rocks hacked and used Berger's account did not get before the jury, thus the evidence to show that others did, in fact use accounts not their own.

Briefly this defendant will mention transportation. The Grand Jury was shown Cam11.jpg as the substantive act for transportation and none other (Doc 198-1). Cam11.jpg was never shown at trial. Therefore we have a material variance. "A variance arises when the evidence presented prove facts that are 'materially different' from those [alleged] in the indictment." United States v. Starr, 533 F3d 985, 996-979 (8th Cir. 2008), quoting United States v. Whirlwind Soldier, 499 F3d 862, 870 (8th Cir. 2007); United States v. Harris, 344 F3d 803, 805 (8th Cir. 2003). The Grand Jury saw Cam11.jpg as the transportation, not WM-5, WM-11A or WM-12. This violates Mumpower's due process rights. The concept of samples doesn't work. The defendant must be tried on what the Grand Jury saw, nothing else. Otherwise, this "defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the Grand Jury which indicted him." Russell, at 770 (supra). Thus Mumpower's conviction for transportation (as well as advertisement of WM-11A and WM-12) is faulty and

must be vacated for the variance as well as the insufficiency of the evidence discussed (supra) with regards to the three advertisements.

B. Receipt

WM-15A & B, as well as WM-16A & B, comprise the two receipts. For out purposes, only the "B" post concerns us, the "A" being the poster's notice. WM-15B fails because it was not presented to the Grand Jury. In re Winship at 364 (supra), Russell at 770 (supra). WM-15B also fails because it lacks proof beyond reasonable doubt that the "Garfield" of this post was actually Mumpower as the government has not provide4d any administrative subpoenas showing Garfield was Mumpower. See Wilder's testimony (supra). Thus WM-15B fails due to the failure to prove beyond a reasonable doubt that Mumpower actually was Garfield and received the images.

WM-16B was shown to the Grand Jury but otherwise fails for reasons discussed with WM-5: No administrative subpoena was shown for Mumpower's ISP and the government relies on the administrative subpoena presented for WM-5 to support this post. Without the subpoena for both NSP and ISP for each post, the Jury can only speculate as to who posted the message or digital media. WM-16B also fails as did WM-5 for lack of the necessary keys "to the Kingdom." See also Mumpower's Memorandum, pgs. 43-45.

C. Exchange For A Thing Of Value

Usenet exists "to promote free access to information. Generally [it does] not operate as a forum for bartering."

United States v. Spriggs, 666 F3d 1284, 1288. (11th Cir. 2012. Within the Achilles group trading/exchange was not a requirement of membership or participation. Notably co-defendant Ronald White never transported (ie., distributed) yet was able to receive without penalty. Also, T.F.O. Constable Power was able to download (receive) images and videos for the entire 18 month investigation, never posting media, sharing, trading or exchanging. Had the group been a trading or exchange group, his failure to upload would have uncovered his ruse and the government's investigation would have failed. (Doc 720, pg. 101, L 11-17)(doc 721, pg. 188, L 20-25). As we cannot call the Achilles group a trading/exchange group, "the expectation of receiving a thing of value mist be understood in the context of a 'transaction' conducted for 'valuable consideration.' ...Without evidence that [Mumpower] and another user conditioned their decisions to share their illicit image collections on a return promise to share files, we cannot conclude there was a transaction under which [Mumpower] expected to receive more pornography." Spriggs, Id. at 1288. There is no evidence any binary post by Mumpower was conditioned on exchange. One note needs to be made with reference to the WM-5 post. Within the post it makes a "Trade Only" remark. This does not refer to the receiver of WM-5 but only to anyone that the receiver may in the future share the video with. WM-12 has a segment within the body of the3 text that clarifies the definition of "Trade Only." This is the definition understood by group members. the part in parenthesis is Box of Rocks' personal view. The Amended Judgement (Doc 793, pg. 1) states that Mumpower was

convicted of advertising the exchange of child pornography under 18 USC § 2251(d)(1) and (2). There is no finding by the jury as to the exchange element of Count 12, the advertisement. Count 12, advertisement, must be vacated and dismissed for failure to prove all the elements of the crime, thus violating Mumpower's due process rights. Note: this also affects sentencing. As it is a clarification, and not a change in statute, the change in enhancement is retroactive. The enhancement for exchange must be dropped.

D. Child Exploitation Enterprise

As the conspiracy was folded into the CEE, conspiracy will be discussed as an element of the enterprise.

The Magistrate, in her R&R states that the conspiracy is moot (Doc 1208, pg. 12). Mumpower disagrees. Although Count 2 has been vacated, both the § 371 conspiracy and the supposed substantive conspiracies were folded into Count 1. Thus it is ripe for discussion both for its effect on the CEE, as well as it could, in the future, be reinstated. Rutledge v. United States, 577 US 292, 306 (1996). Did the Government charge and prove one § 371 general conspiracy against the laws of the United States, multiple separate and independent substantive conspiracies, or both? Mumpower believes Count 2 can only stand as a single § 371 conspiracy since the objects of the conspiracy are general in nature and against the laws of the United States, not multiple specific conspiracies to commit specific crimes (See Russell, supra at 765) which is required for a predicate act in a CEE. Count 2 was "[a] single agreement to commit several crimes which constitutes

one conspiracy." United States v. Broce, 488 US 503, 507 (1989). "Whether one or multiple conspiracies are proven depends on whether the evidence demonstrates a 'single enterprise.'" United States v. Rosen, 764 F2d 763, 765 (11th Cir. 1985) quoting Kotteakos v. United States, 328 US 750, 769 (1946). "Whether the object of a single agreement is to commit one or many crimes, it is in either case THAT AGREEMENT which constitutes the conspiracy which the statute punishes. The one agreement cannot be taken to be several agreements and hence several conspiracies because it envisages the violation of several statutes rather than one. Braverman v. United States, 317 US 49, 53 (1942)(emphasis added).

If, in fact, a single § 371 conspiracy does exist, it occurred with the acceptance of membership to the group, one single agreement occurring once with one single objective which "was to ... amass as much child pornography as they could" (opening statement, Doc. (unknown) pg. 3, L 20-22), memorialized in the group's FAQ (Government Exhibit 10 and Doc 720, pgs. 87-92) and as charged in the indictment. There is absolutely no proof that Mumpower engaged in any independent, separate substantive conspiracies. The named acts in the indictment's charge which are different from the jury verdict form, are part of the whole, and indivisible from the scheme/objectives of Count 2's general, § 371 conspiracy. If one of the enumerated objects, as defined in the indictment fails, (or for that matter the enumerated conspiracies of the jury form), the whole scheme falls apart. They are interdependent which proves "that the indicted [§ 371] conspiracy was a single unified conspiracy as opposed to a

series of smaller, uncoordinated conspiracies." United States v. Toler, 144 F3d 1423, 1426 (11th Cir. 2008). "Multiple conspiracies are separate agreements operating independently of each other. However, a finding of a master conspiracy that includes other sub-schemes does not constitute a finding of multiple unrelated conspiracies." 3rd Cir. Pattern Jury Instruction 6.18.371H. The indictment charged only one conspiracy and the objects listed are substantive. But after both the government and the defense rested, the jury verdict form was changed to show the objects as conspiracies. Mumpower contends that the alleged conspiracies on the verdict form are not substantive in nature as they lack the particularity required by Russell, (supra) at 765, and the particularity required to be folded into the CEE as predicate acts.

Had the court denied co-defendant's counsel, Mr. Oram, his request for instruction 13.3 and used the proper instruction 13.2, multiple objects, the instruction would have matched the indictment (Doc 724, p. 1166). Trial counsel was constitutionally ineffective. He should have objected and requested the proper 13.2 instruction (multiple objects) as the indictment calls for, and what the Grand Jury indicted on. Because of his error, Mumpower was convicted of Count 1 in error due to non-existent substantive conspiracies being folded into the CEE. Because Mumpower's due process rights as well as his right to be informed of the nature and cause of the accusation, Russell, supra at 765, violated his constitutional rights, and his trial counsel was constitutionally ineffective, the conspiracy portion of the

CEE should be vacated.

The government, as well as the Magistrate, continually reference the "Achilles" newsgroup as " the enterprise." The group itself is not a CEE, nor did anyone have to advertise, transport, receive or possess child pornography. One could actively participate without ever committing a crime. Though Mumpower never took the test, from group discussion Mumpower believes the posting to the test did not require posting child pornography. Legal child modelling, photo art and nudist posts were also accepted.

The government and district court are incorrect, as was the government's theory of prosecution, (that only 3 predicate acts among all the members of the group were needed. Doc 760, pg. 99, L. 19-25). The government's theory was debunked by the appellate court when they said 3 substantive incidents per individual was required. In effect there were as many enterprises as people convicted. Therefore Mumpower's alleged enterprise must stand alone with the 3 or more predicate incidents, two or more victims and 3 or more other persons acting in concert. Mumpower also argues that when Congress stated in the CEE statute, "a series of felony violations constituting three or more separate incidents," they did not mean "instances" which has quite a different meaning. the Career Criminal Enterprise only requires a continuing series of felony violations, ie., a series of instances. "Incidents" in the distribution of child pornography means each TRANSACTION which may possibly include multiple felony violations within each single incident. Otherwise, as an example, the advertisement, transportation

and conspiracy of WM-12 could constitute the required "three or more separate incidents" and this is not the intent of Congress. WM-12 is only one incident.

Because the Child Exploitation Enterprise (18 USC § 2252A(g) requires the commission of "three or more separate incidents," the CEE fails with respect to Mumpower as he is actually Innocent of WM-12 and factually innocent of WM-11A. (See discussion on insufficiency of the evidence, supra). This leaves only one possible qualifying incident, WM-5, which Mumpower believes the evidence was constitutionally insufficient to convict. Mumpower believes the government did not prove three persons acted in concert with him. Nobody acted in concert with Mumpower in the commission of any possible qualifying substantive count the government believes Mumpower committed. While this defendant agrees that the § 371 conspiracy was properly folded into the CEE as to the agreement portion of the "in concert" element, there is more to the "in concert" as "it has generally connoted cooperative action AND agreement... "Rutledge v. United States, 517 US 292, 299 N. 10 (1996)(emphasis added). There is no evidence that shows anyone took any cooperative action that furthered the advertisement and transportation of WM-5, WM-11A or Wm-12. For that matter, no evidence was shown that anybody received any of the videos or images of the three alleged qualifying posts, read any of the messages or specifically conspired with this defendant as to the substantive conspiracies.

The Magistrate failed to do an analysis of who acted in concert with Mumpower to commit the three predicate offenses as was don in United States v. Daniels, 653 F3d 399,

412-414 (6th Cir. 2011).

Because Mumpower was erroneously convicted of the CEE, he holds that he has been egregiously harmed due to his loss of liberty in violation of the Due Process Clause.

E. Venue

Venue was never proven. Nor was a jury instruction asked for. Six of seven defendants on trial were there on extradition. Mumpower believes the Magistrate is legally and factually incorrect in her assessment of venue. Doc. 1208, pg. 10-12. This defendant does not question venue for the conspiracy portion of the "in concert" element of Count 1, only 12, 22 and 35. Thus the Magistrate's argument for the remainder of pg. 10 is useless boilerplate.

Next, the Magistrate claims that a co-conspirator is vicariously responsible for the acts of any co-conspirator - except she forgets the Eleventh Circuit requires a Pinkerton Jury Instruction (13.5), but none was given. Then she claims aiding and abetting qualifies. While a jury instruction was given, the jury did not return a finding of guilt on aiding and abetting for anyone.

Finally, citing 18 USC § 3237(a), she states, "offenses begun in one district and completed in another ... may be prosecuted in any district in which such offense was begun, continued, or completed." There was no evidence given at trial that any substantive offense involving Counts 12, 22 or 35 begun, continued or was completed within the Northern District of Florida. In United States v. Schlei, 122 F3d 944, 974-75, and 979 (11th Cir. 1997), Schlei was convicted in the

Middle District of Florida for conspiracy (974-75), but the Olson transaction took place in North Dakota, thus lacked venue (979). In United States v. Cabrales, 109 F3d 471, 472 (8th Cir. 1997), affirmed at 524 US 1 (1998), the conspiracy took place in Missouri yet the money laundering of the proceeds of the conspiracy took place in Florida. venue was lacking. Again there was no evidence presented at trial that any substantive post by Mumpower was begun, passed through or ended in Florida. The sentence referencing WM-29D and WM-29E is nothing more than an unnecessary distraction. WM-29D is a copy of a post between Mystical and Umami discussing the posting of what Mumpower believes to be LEGAL content. It does not involve this defendant. WM-29E is a rather old nic list from March 2006 and highly inaccurate. After all it says "Lizzard" is "Fruit Cake" yet WM-1 from the same food group claims "Lizzard" is Waffles. The Magistrate has done nothing more than cite useless, inapplicable boilerplate without addressing the constitutional Sixth Amendment issues involved. Mumpower thus remains steadfast that venue for Counts 12, 22 and 35 are lacking.

Trial counsel was constitutionally ineffective for failure to request a venue instruction for file a motion to acquit on Counts 12, 22 and 35 for failure to prove venue in the Norther District of Florida.

Appellate counsel also failed to argue venue and is constitutionally ineffective.

Mumpower was falsely convicted in the Northern District of Florida and was harmed due to loss of liberty and property (fine and assessment).

F. Ineffective Assistance Of Counsel

1. Trial counsel made 6 critical errors that proved fatal to Mumpower['s defense.

First, he abandoned his client when he refused to present a defense. "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." Lockhart v. Fretwell, 506 US 364, 369 (1993), quoting Kimmelman v. Morrison, 477 US 365, 374 (1986). Mumpower presented numerous pages of evidence in his memorandum and reply brief that trial counsel could have entered into evidence on defense, but didn't. The lack of defense blocked the jury from hearing of the hacking/misuse of Berger's account by Box of Rocks, the same individual that posted WM-12, confessed to it in Joint Exhibit WM-1 and messaged with Constable Power 5 days AFTER Mumpower and Berger were in jail. See Memorandum, Defendant's Exhibit DX-6. Monorail Cat is Box of Rocks aka Cartman. Origami is Constable power. See also discussion at pgs. 22-28 of Mumpower's memorandum and Doc. 724, Pg. 1144, L 17 to 1145 L 2. Trial counsel's actions also failed to preserve evidence and arguments for appeal. Cronic v. United States, 466 US 648, 657 (1984).

Second, trial counsel abandoned his client during the viewing of digital evidence at evening recess on day 3. This viewing and discussion that should have taken place was vital to a competent defense. see Reply Brief, pgs 25-27. Cronic, Id.

Third, Lang made a serious mistake with terminology by

referring to a virus instead of a Trojan while cross examining the government's forensics expert, seriously damaging defenses credibility. Doc 723, Pgs. 916-918; Memorandum, pgs. 34-35, and Reply, pgs. 30-34.

Fourth, trial counsel made serious errors during cross-examination of WM-12 and his presentation of Joint Exhibit WM-1. See Doc 723, pgs. 876, L 7 to 877, L 16; pgs 883, L 19 to 885, L 1; Doc 760, pg. 78, L 4-24; Memorandum pgs. 27-28.

Fifth, trial counsel got an extremely important date wrong (January 21, 2007) for the last key the Government said Mumpower possessed. Again damaging defense credibility, Memorandum pg. 34 and 37; Doc 723 pg. p929, L 16-20; pg. 930, L 8-13; Reply, pg. 14.

Sixth, Lang made no mention in his closing argument about the jury not seeing the images for WM-11A or the fact they are legal, or take any steps to preserve that information for appeal such as a motion to dismiss for failure to prove all the elements of WM-11A.

In summary, there is an ongoing pattern with Langs ineffectiveness. In each of the three advertisement-transportations during cross examination and at other times Lang took measures that destroyed defense credibility: WM-12 - the comparison of WM-12 and Joint Exhibit WM-1; WM-11A - failure to preserve the legality of the images or that they were not seen by the jury; and WM-5 as well as the receipt WM-16B, the incorrect date for the keys. Each error damaged defense credibility and each resulted in conviction. Lang was not just incompetent, his actions appear as a deliberate

pattern of ineffectiveness, delivering the trial into the hands of the government and assuring that Mumpower would have an unfair disadvantage on appeal because of an incomplete record. See also other errors mentioned throughout this brief and ineffective assistance arguments throughout Defendant's Memorandum and pgs. 64-65 as well as Reply Brief pgs. 44-47 and throughout.

2. There is little said about appellate attorney Gary L. Printy that's not already been said. I therefore reference this Court to Defendant's Reply Brief, pgs 48-50; Memorandum Pgs. 10-11 and pgs. 65-67; and Objections To Magistrate's R&R, pgs 25-27 as well as numerous other instances throughout the named documents as well as this instead document.

Appellate attorney Printy isn't just constitutionally incompetent, he's a criminal, plagiarizing this defendant's entire brief from co-counsel then signing his name to it and getting paid for work he did not do. That's fraud under the False Claims Act. (Note: Printy is a C.J.A. contract attorney). "As construed in law of plagiarism, copying is not confined to literary repetition, but includes various ways in which matter in any publication may be adopted, imitated, or transferred, with more or less colorable alterations to disguise piracy; no matter how different portions of work may be from plagiarized product, it is enough if substantial parts were lifted." Cantor v. Mankiewicz, (1960, sup) 203 NYS2d 626, 125 USPQ 598. In re Steven A. Mundie, Attorney, 453 Fed. Appx. 9, 16-21 (2nd. Cir. 2011). See also Taco Cabana Int'l v. Two Pesos, Inc, 932 F2d 1113, 1124 and Ns. 16-17 (5th Cir. 1991).

Printy obtained an extension of time under false pretenses then, it is believed, waited until other co-counsel's briefs were posted to Pacer, and plagiarized them. He also showed a pattern of trying to weasel out of doing his own work at defendant's sentencing, (Memorandum, pg 65)(Doc. ECF 812, pg. 1, L 8 to Pg. 5, L 9)(Reply Brief Exhibit RX-7). See also various arguments on ineffectiveness of appellate counsel throughout the memorandum, reply brief and objections to Magistrate's R&R, as well as this instant document. One can only call Printy's conduct unethical, dishonest, constitutionally incompetent and criminal. As stated in a previous document, in my home State we call an attorney like Printy - A Charlatan!

3.) APPELLATE COURT ERRORS

A. The Appellate Court is in error when it constructively amended the indictment by folding the supposed substantive conspiracies into the CEE to sustain a conviction on Count 1 for lack of a third predicate act. "Ever since Ex Parte Bain, 121 US 1; 7 S.Ct. 781, was decided in 1887, it has been the rule that after an indictment has been returned its charges may not be broadened through amendment except by the Grand Jury itself." Stirone v. United States, 361 US 212, 215-16 (1960). The first mention of anything resembling substantive conspiracies is on the Jury Form. Not even the jury instructions mention substantive conspiracies nor does the Indictment. As written it is a single § 371 conspiracy with multiple objects. That is what this defendant expected

to be tried for. That is what the Grand Jury indicted for and that is what the Trial Jury was presented during the trial. "To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury at trial offends the most basic notions of due process. Few constitutional principals are more firmly established than a defendant's right to be heard on the SPECIFIC CHARGES of which he is accused... [a]ppellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." Dunn v. US, 442 US 100, 106 (1979); McCormick V. United States, 500 US 257, 270 N. 8 (1991). See also Stirone, Id. "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." Dunn, Id. at 107, quoting Cole v. Arkansas, 333 US 196, 201 (1948).

B. Though legally correct in its thinking, the Appellate Court was in error when it changed the government's theory that only 3 predicate acts were needed among all the defendants to 3 predicate acts each and sustained the convictions. Doc. 760, pg. 99, L 19-25. the jury instructions, elements 1, 3 and 5, clearly refer to "the defendant." But 2 and 4 do not and thus left the jury to choose 3 predicates among all defendants. Doc. 469, pg. 17. Since this jury instruction was written by the prosecutor there can be no doubt what it was intended to mean. Doc 724, pg. 1161, L 10-16 and pg. 1165, L 22-25.

It is also obvious that the jury convicted on 3

predicate acts among all defendants. Defendant White was convicted because of the false government theory and his conviction was reversed. He did not have three qualifying predicate acts himself. "[W]e cannot affirm a criminal conviction on the basis of a theory not presented to the jury..." Chiarella v. United States, 445 US 222, 236 (1980). See Dunn Id. at 106. "This Court has never held that the right to a jury trial is satisfied when an appellate court retries a case on appeal under different instructions and on different theory than was ever presented to the jury." McCormick, Id. at N. 8.

Appellate counsel was constitutionally ineffective for failure to ask for a rehearing or rehearing en banc on the two errors. Had he done so, the court would have been obligated to reverse Mumpower's conviction on Count 1. Mumpower's due process rights were violated and he has been harmed by a loss of liberty with a life sentence.

4.) Failure Of The District Court To Address All Constitutional Claims

Mumpower's Objections To The Magistrate's R&R is as good a discussion for this claim as can be done by this defendant, supplemented by discussions in this instant brief as well as Defendant's Memorandum In Support of his § 2255, and Reply Brief.

It is clear throughout the trial, and appeal what the government's stand is on the faulty indictment. The government doesn't want to concede the fault even though it is clear that the indictment does not meet the Russell (supra)

standards. See also United States v. Bobo, 344 F3d 1076, 1083 (11th Cir. 2003). It's so simple. The government only needs to follow its own example in the indictment for Count 2 (the overt acts). No. 14, which is WM-11A, is correctly worded, and Counts 12, 22, and 35 should have followed that example. Everything would have been OK, but instead, the government chose to dump the 3 advertisements, 3 transportations, and 2 receipts into a single advertisement, transportation and receipt so they could be left "free to roam at large to shift its theory of criminality so as to take advantage of each passing vicissitude of trial and appeal." Russell, supra at 768. The Court below abused its discretion and chose to follow the governments faulty indictment to save a conviction rather than follow the law. Mumpower still does not know which advertisement, transportation or receipt the jury convicted him of, violating Mumpower's due process rights.

The Court below abused its discretion and refused to accept the fact that the images for WM-11A were never published (shown) to the jury, thus the government failed to prove all the elements of that charge, violating Mumpower's due process rights and confrontation rights. If the Court truly believed the images were shown to the jury, they would have pointed to trial document, page, and line as to where the images were published. They did not. (Doc 1208, pg. 40).

The Court below abused its discretion and refused to accept the Eleventh Circuit's precedent that requires a Pinkerton instruction to the jury for co-conspirator liability. United States v. Raffone, 693 F2d 1343, 1346 (11th Cir. 1982).

the Court below quotes, "[t]o set aside a conviction solely because the outcome would have been different but for counsel's error may grant the defendant a windfall to which the law does not entitle him." Lockhart v. Fretwell, 506 US 364, 369-70 (1983), (Doc 1208, pgs. 43-44). But the Court applied it incorrectly. It's the appellate counsel defendant claims is lawless, not the trial counsel. The Court fails to discuss or even mention his lawlessness. I agree with Lockhart, but I also believe it is equally wrong when the government is the deliberate benefactor of defendant's lawless appellate counsel.

These are just a few of the more serious issues that are outlined in the Objections To The Magistrate's R&R. I ask the Eleventh Circuit to vacate and dismiss the Magistrate's R&R in its entirety and grant Mumpower his § 2255 in full. Or, in the alternative, vacate the R&R, order the Court below to hold an evidentiary hearing and issue a new R&R explaining each constitutional claim fully without needless boilerplate that is irrelevant or out of context.

Conclusion

This defendant placed his trust in his trial and appellate counsel only to be abandoned and betrayed by both which has violated Mumpower's constitutional due process, fair trial, free speech rights, and right to effective assistance of counsel under the U.S. Constitution. They are both deliberately incompetent and constitutionally ineffective as discussed throughout.

Mumpower requests an evidentiary hearing and wishes to

develop the following:

1. Settle the dispute between the government and defense as to WM-11A's images being published.

2. Discuss the legality of WM-11's images and gain access to those images to discuss them with Mumpower's assigned attorney (if any).

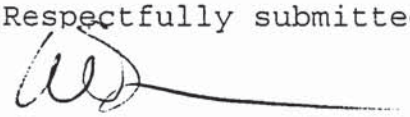
3. Mumpower needs to do further research (discovery) on the hacking/use of others accounts, and subpoena the original posts downloaded by Power and Cordero referenced in Defendant's Exhibit DX-7. Mumpower needs digital copies of the actual keys used in those downloads as mentioned in DX-7 and needs a working copy of PGP. Mumpower needs copies of the original encrypted messages, and needs access to Berger's evidence disks. Mumpower needs an exact image (forensic copy) of Berger's harddrive. This defendant will be looking at his forensics - how his machine was set up, what software was installed, Trojans/viruses found, forensics report, Cart report, NCMEC report, and keys found, etc., all discovery trial counsel should have done.

4. Mumpower needs the laptop purchased for our discovery pre-trial with all the original evidence disks installed (including Bergers) as we installed pre-trial.

5. Mumpower needs copies of all documents entered in evidence at trial.

This may not be all that's required, as evidence discovered may lead to more evidence needed to support this defendant's claims.

Respectfully submitted,



CERTIFICATE OF COMPLIANCE

This brief is 30 pages or less in length and complies with the requirements of Federal Rules Of Appellate Procedure 32(a)(7).

Warren Mumpower, pro se
05984-018

CERTIFICATE OF SERVICE

I Certify that a true and correct copy of the foregoing was served via first class mail, proper postage paid, on David L. Goldberg, AUSA, 21 E. Garden St., Pensacola, Fl. 32502 this 5TH day of April, 2017.

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Under penalty of perjury, I, Warren Mumpower, declare this document was mailed at the U.S. Penitentiary-Tucson mailroom, first class postage paid in accordance with the Mailbox Rule on the 5TH day of April, 2017.

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